HARTECON J.V. SDN. BHD.

v.

PERWIRA HABIB BANK BHD.

HIGH COURT MALAYA, KUALA LUMPUR
ZAKARIA YATIM J
[SUIT NO. C3909 OF 1985]
20 DECEMBER 1985

CIVIL PROCEDURE: *Dissolution of injunction - Striking out writ of summons and statement of claim under O. 18 r. 19 Rules of the High Court 1980 - Assessment of damages - Costs.*

CONTRACT: *Joint Venture Agreement - Purchase Agreement - Technical know how Agreement - Credit Agreement - Guarantee - Arbitration of disputes.*

The defendant, in this case, is seeking the order of the Court:

1. to dissolve an injunction;
2. to strike out the writ of summons and statement of claim under O. 18 r. 19 of the Rules of the High Court 1980;
3. that damages be assessed; and
4. for costs.

The injunction was granted to restrain the defendant from paying a fixed sum or any other sum under a guarantee in favour of the Union Bank of Finland.

Held:

[1] The plaintiff has failed to disclose, in its statement of claim any cause of action against the defendant. The defendant was not a party to the joint venture agreement between the Finnish firm Ferrostaal and Finnish Fund, to the purchase agreement between the plaintiff and the Finnish Firm Hartela to the technical know how agreement to the credit agreement between the plaintiff and Hartela. The defendant was again not a party to the disputes that arose between the plaintiff and Hartela. Neither was the plaintiff a party to the guarantee which the defendant furnished in favour of the Union Bank of Finland.

[2] The Plaintiff claim is vexatious and frivolous and an abuse of the process of the Court. In their statement of claim, the plaintiff avers that any disputes should be referred to arbitration. But the arbitration clause only refers to a dispute between Hartela and the Union Bank.

[3] Under the guarantee, the Union Bank was obliged to pay a fixed sum plus interest to Hartela, when Hartela issued a certificate confirming the disbursement according to the terms of the loan agreement. This sum is about the same amount as stated in the agreement between the defendant and the Union Bank.

[4] The balance of convenience is in favour of the defendant. The plaintiff will not suffer any hardship if the injunction is set aside. But if the injunction continues, the credibility of the defendant as a bank will be adversely affected when dealing with overseas bank. It will lose its reputation and suffer damages which cannot be compensated in monetary terms.

[5] The learned Judge, accordingly ordered that

(a) the injunction be dissolved;

(b) damages be assessed by the Senior Assistant Registrar;

(c) the writ of summons and the statement of claim be struck out under O. 18 r. 19 of the Rules of the High Court 1980 and under the inherent jurisdiction of the Court;

(d) the plaintiff should pay the cost of this application to the defendant.

Cases referred to:
American Cynamid Co. v. Ethicon Ltd. [1975] 1 All ER 504
Elian and Rabbath v. Matsas and Matsas [1967] Lloyd's LR 495

Legislation referred to:
Rules of the High Court 1980, O. 18 r. 19

Other sources referred to:
The Supreme Court Practice, 1985, Vol. 1, p. 161

For the respondent/plaintiff - Dennis Xavier, (Alex Anthony with him); M/s. Lawrence, Dhillon & Associates
For the defendant - Shakuntala Sharma; M/s. Sharma & Jaafar

JUDGMENT

Zakaria Yatim J:

In this application the defendant is seeking the order of the Court (1) to dissolve an injunction granted on 15 July 1985; (2) to strike out the writ of summons and statement of claim under O. 18 r. 19 of the Rules of the High Court 1980; (3) that damages be assessed and (4) for costs.

The injunction granted on 15 July 1958 restrained the defendant, its agents or servants

> from paying the sum of US$1,073,822.58 or any other sum under the guarantee dated 15 December 1983 in favour of the Union Bank of Finland ...

I shall first deal with the application to strike out the writ of summons and statement of claim under O. 18 r. 19. In order to consider this application it is necessary to examine the statement of claim.

Paragraph 1 of the statement of claim states that the plaintiff is a company incorporated in Malaysia and having its registered office at No. 3, Jalan 51A/227, Petaling Jaya. In para. 2 it is stated that the plaintiff company was formed pursuant to a joint venture agreement concluded on 23 March 1983 between Ferrostaal (M) Sdn. Bhd. (Ferrostaal), Hartela Contractors Ltd. (Hartela) and Finnish Fund for Industrial Development Corporation Ltd. In para. 3, the plaintiff avers that by a purchase agreement dated 8 August 1983 entered into between the plaintiff and Hartela, the parties agreed, *inter alia,* to erect and operate concrete precast factory on a turn key basis and by a "Technical Know How Agreement" dated 6 September 1983 Hartela agreed to a transfer of technology in the operation of the said factory.

In para. 4, the plaintiff avers that by a credit agreement concluded between the plaintiff and Hartela on 28 May 1983, it was agreed that Hartela would supply the machinery for the construction work. In para. 5, the plaintiff refers to the following clauses in the Credit Agreement: (a) Under clause 4A a portion of 5,100,000 Finnish Marks of the credit shall be repaid in ten equal semi annual instalments amounting to 510,000 Finnish Marks each. (b) Under clause B a portion of 1,700,000 Finnish Marks shall be repaid in ten equal semi-annual instalments amounting to 170,000 Finnish Marks. (c) Under clause 4E the first instalment of portion under clause 4B of the Credit amounting to 170,000 Finnish Marks is to be effected six months after the date certified according to Article 17 of the purchase contract to be the date when all equipment is installed and ready for operation. (d) If the plaintiff fails to pay any sum due from it under the agreement then the credit agreement would be determined and the whole sum becomes due and payable (e) The plaintiff is required to furnish an unconditional and irrevocable guarantee given by a bank acceptable to the lender.

In para. 6 the plaintiff avers that the defendant on 15 December 1985 duly furnished the guarantee in favour of the Union Bank of Finland.

According to the plaintiff, it was the term of the guarantee that any dispute arising therefrom would be referred to arbitration under the International Arbitration Rules of the London Court of Arbitration.

The plaintiff alleges that disputes had arisen between the plaintiff and Hartela because Hartela had not substantially completed the installation works.

The plaintiff avers that in anticipatory breach of the credit agreement, Hartela repudiated the credit agreement and made a demand on the Union Bank for the full sums as set out in the credit agreement. On 25 June 1985 the Union Bank paid Hartela the said sums and subsequently demanded payments from the defendant of the sum of US$1,073,822.58. The plaintiff through their solicitors instructed the defendant not to pay the sum but refer the dispute to arbitration in accordance with the terms of the guarantee.

Having considered the statement of claim, I am of the view that the plaintiff has failed to disclose any cause of action against the defendant. The plaintiff has not shown any fact in the statement of claim to support his claim against the defendant. In other words the plaintiff has not shown a factual situation the existence of which entitles him to obtain a remedy against the defendant. See *The Supreme Court Practice,* 1985, vol. 1, p. 161.

The defendant was not a party to the joint venture agreement which was concluded between Ferrostaal, and Finnish Fund. The defendant was not a party to the purchase agreement concluded between the plaintiff and Hartela on 8 August 1983. The defendant was not a party to the technical know how agreement dated 6 September 1983. Similarly, the defendant was not a party to the credit agreement concluded between the plaintiff and Hartela. In the statement of claim the plaintiff alleges that disputes arose between the plaintiff and Hartela. The defendant is not a party to the disputes. The plaintiff avers that the defendant, on behalf of the plaintiff, furnished a guarantee in favour of Union Bank of Finland. From the statement of claim it is implicit that the guarantee was between the defendant and the Union Bank and the plaintiff is not a party to the guarantee. Mr. Xavier, Counsel for the plaintiff, in fact conceded this fact.

I find that the plaintiff's claim is also vexatious and frivolous and an abuse of the process of the Court. In their affidavit dated 22 July 1985, the defendant avers that it was never a party to any of the agreements mentioned in the statement of claim. It also avers that the

plaintiff was not a party to the guarantee agreement. In their statement of claim the plaintiff states that in the event of dispute the matter should be referred to arbitration. But the arbitration clause refers to a dispute between the Union Bank and Hartela. The clause does not apply to any dispute between the plaintiff and Hartela under the agreements concluded between them.

One of the essential requirements for the Court to consider in the present application is whether there is a serious question to be tried. See *American Cynamid Co. v. Ethicon Ltd.* [1975] 1 All ER 504. I have already made a finding that the statement of claim not only fail to disclose a cause of action against the defendant but it is also frivolous, vexatious and an abuse of the process of the Court. In my judgment, there is no serious question to be tried in the instant case.

Mr. Xavier submitted that although the plaintiff was not a party to the guarantee agreement the plaintiff has an important interest in the guarantee because once payment is made by the defendant, the plaintiff's account could be debited. In support of his submission he relied on the decision of the English Court of Appeal in *Elian and Rabbath v. Matsas and Matsas.* [1967] Lloyd's LR 495. In that case shippers in Beirut shipped goods on a Greek ship chartered by Lebanese Charterers. The ship was bound for Rijeka in Yugoslavia but the goods were consigned to buyers in Hungary. When the ship got to Rijeka there was delay in unloading and the shipowners claimed a lien on the goods for demurrage. After some negotiations the shippers undertook to give a bank guarantee on the condition that the shipowners released the lien. Subsequently a bank guarantee was given. As soon as the guarantee was given the master of the vessel began to exercise another lien. When the shipowners were going to claim on the guarantee, the shippers issued a writ asking for a declaration that the guarantee was not a valid contract and also for an injunction to restrain the shipowners from receiving the money from the bank under the guarantee. In his judgment at p. 497 Lord Denning MR said,

> Although the shippers were not parties to the bank guarantee, nevertheless they have a most important interest in it. If the Midland Bank Ltd. pay under this guarantee they will claim against the Lebanese Bank, who in turn will claim against the shippers. The shippers will certainly be debited with the account. On being so debited, they will have to sue the shipowners for breach of their promise, express or implied, to release the goods. Are the shippers to be forced to take that course? Or can they short-circuit the dispute by suing the shipowners at once for an injunction?
>
> I think this is a special case in which an injunction should be granted... and **when the shipowners, in breach of the understanding, imposed a further lien, they were disabled from acting on the guarantee** ... In this circumstances I think an injunction should be granted [Emphasis added]

The facts in the *Elians* case are distinguishable from the present case. In the present case the defendant requested the Union Bank to issue a bank guarantee to Hartela. The agreement between the defendant and the Union Bank is contained in a telex dated 15 December 1983. The agreement reads:

> Please issue your bank guarantee on our behalf to Hartela Contractors Ltd. Kutojautie 6 02630 Espoo 63, Finland In consideration of your so doing we hereby undertake to indemnify you up to an amount not exceeding 6,800,000 Finish marks until your liabilities under this guarantee has been discharged.

In the same telex, the defendant also included the terms of the guarantee. The terms are as follows:

> Whereas according to the loan agreement dated 28 November 1983 and concluded between Hartecon J.V. Sdn Bhd (Hartecon) and Hartela Contractors Ltd (Hartela) it is stipulated that 6,800,000 Finnish marks be granted as loan to Hartecon, this Bank guarantees to pay the first (second) instalment of the loan up to the sum of 5,100,000 (1,700,000) Finnish marks and the 10.85 per cent interest per annum and the 5.15 per cent additional interest per annum on delayed payments, when demanded by Hartela immediately and without any hesitation on receipt of the first written demand without any need of any action through the executive or legal channels or through any other government agency.
>
> This bank thus obligates itself unconditionally and irrevocably to pay Hartela Contractors Ltd or order or conditions mentioned above the principal sum of 5,100,000 (1,700,000) Finnish marks plus 10.85 percent interest per annum and 5.15 per cent additional interest per annum calculated on that principal from the date of this guarantee letter or the eventually later date of disbursement evidenced by Hartecon J.V. Sdn Bhd through a certificate in English issued by Hartela Contractors Ltd. confirming the disbursement day according to the terms of the loan agreement and we declare that we are entitled to deduct from the principal or the interest only the sums of which Hartela Contractors Ltd. had given an original written receipt of an effected payment of the principal or interest or an original written acknowledgement given by Hartela Contractors Ltd. stating that a payment of principal or interest was not delayed provided that the receipt or acknowledgement includes reference both to the loan agreement and this guarantee letter.
>
> This guarantee letter shall be governed by and construed in accordance with the law of England.
>
> Any dispute or difference between the parties in connection with this agreement shall be referred to and determined by arbitration under the international arbitration rules of the London Court of arbitration.
>
> The parties agree to exclude any right of application or appeal to the English Courts in connection with any question of law arising in the course of the arbitration or with respect to any award made.

I find that the terms of the guarantee were not written in clear language. Nevertheless, on reading the guarantee it appears that the Union Bank was obliged, under the guarantee, to pay Hartela 5,100,000 Finnish Marks plus interests when Hartela issued a certificate confirming the disbursement according to the terms of the loan agreement. This sum is about the same amount as stated in the agreement between the defendant and the Union Bank. The guarantee refers to a loan agreement, which is presumably the Credit Agreement but there is no evidence before this Court that the Union Bank had a copy of the agreement.

According to the defendant's affidavit dated 22 July 1985

> Hartela made a demand on the Union Bank on their guarantee to them (Hartela) and on or about 25 June 1985 the Union Bank honoured their guarantee and made payment to Hartela of a sum of Finnish Marks 6,737,525.23.

The plaintiff in their affidavit dated 13 July 1985 confirmed that payment had been made by the Bank. The affidavit stated:

> The Bank of Finland nevertheless made payment to the said Hartela on the 25 June 1985 on the strength of a letter dated 25 August 1984 issued by one Mikko Kaarenmaa, the technical Director of the plaintiff ...

The letter referred to in the plaintiff's affidavit is reproduced below:

> Kuala Lumpur
> 25 August 1984
>
> Hartela Contractors Ltd.
> Kutojautie 6
> 02630 Espoo 63
> Finland
>
> Dear Sir,
>
> **Re: Purchase Contract Hartecon/Hartela Contractors**
>
> With reference to the above contract I in the capacity of the examiner as per Article 17 of the contract agreement hereby certify that the installation of the machinery at Rawang Factory site is substantially completed i.e. ready for operation.
>
> Respectfully yours,
> Hartecon J.V. Sdn. Bhd.
>
> Sgd.
> Mikko Kaarenmaa
> Technical Director.

In my opinion, bearing in mind the terms of the guarantee quoted above and the affidavit affirmed by the defendant and the plaintiff and in view of the letter written by Mikko Kaarenmaa certifying that the installation of the machinery was substantially completed and was ready for operation, it was only proper for the Union Bank to pay Hartela, the full sum of 6,737,525.23 Finnish Marks.

Mr. Xavier, in his submission, disputed the certificate written by Mr. Mikko Kaarenmaa on 25 August 1984. I agree with Miss Sharma when she said that whether the letter was properly written was a matter to be decided at the trial and not at this stage of proceedings. I fail to understand on what basis Mr. Xavier disputed the letter. Firstly, the letter was written on behalf of the plaintiff. Secondly, it was written pursuant to Article 17 of the Purchase Contract concluded between the plaintiff and Hartela on 8 August 1983. The article states:

> **Article 17: Examiner**
>
> Whether installation is completed according to the Article 12, subclause C and Article 15 or not, will be certified by an examiner agreed by the parties to be the technical director of Hartecon.

The delivery and installation are regarded to be completed when they have been substantially completed even if minor defects exist which do not prevent operating the plant, provided that these defects will be made good within a reasonable time determined by the examiner.

It is the duty of the Examiner in case of not total but substantial completion to prepare a list to be included in the certificate indicating the defects that have to be made good.

Having arranged an examination on the spot and having called the parties to participate in the examination, the examiner's certificate produced in writing and dated and signed by the examiner, is binding to the parties.

The examiner has the authority to give certificate also of occurrence of other facts relevant between the parties according to this agreement.

It is, thus, clear that under Article 17, the certificate is binding upon the plaintiff.

Having examined the facts and all the circumstances in the present case, I am satisfied that unlike the *Elian's* case *supra,* Hartela or the Union Bank had not done anything in breach of the guarantee. I find that Hartela had conducted itself in accordance with the terms of the agreements and the guarantee. The Union Bank, too had discharged its obligation as requested by the defendant.

Mr. Xavier submitted that under each of the four agreements, the parties should refer their disputes to arbitration in accordance with the arbitration clause contained therein. The question of referring any dispute between the plaintiff and Hartela under the four agreements does not arise at this stage of the proceedings. Furthermore Hartela was not even made a party to the proceedings. Mr. Xavier further submitted that the defendant should invoke the arbitration clause under the guarantee. In the first place, the guarantee was provided by the Union Bank in favour of Hartela. Secondly, there is no evidence of any dispute between the Union Bank and Hartela or between the defendant and the Union Bank or Hartela. Therefore, the question of arbitration under the terms of the guarantee does not arise at all.

The next question is whether the Court has to consider the balance of convenience in the present case. In my judgment, since the plaintiff has failed to show that there is a serious question to be tried, the injunction should be dissolved without even considering the balance of convenience. However, even if there is a serious question to be tried in the present case, I find that the balance of convenience is in favour of the defendant. According to Mikko Kaarenmaa's letter, the factory was substantially completed and was in fact ready for operation. There is no reason why the defendant should be further restrained from indemnifying the Union Bank which had paid Hartela in advance. I fail to see in what way the plaintiff will suffer any hardship if the injunction is set aside. On the other hand, if the injunction continues, the credibility of the defendant as a bank will be adversely affected when dealing with overseas bank. Foreign banks will be reluctant to do business with the defendant. It will lose its reputation and suffer damages which cannot be compensated in monetary terms.

For the reasons stated above, I order that -

(i) the injunction granted on 15 July 1985 be dissolved further with;

(ii) a date be fixed for the Senior Assistant Registrar to assess damages;

(iii) the writ of summons and the statement of claim filed on 15 July 1985 be struck out under O. 18 r. 19 of the rules of the High Court 1980 and under the inherent jurisdiction of the Court.

(iv) the plaintiff will pay the cost of this application to the defendant.

Also found at [1988] 1 CLJ 606